



Globis Model Mediation Guide

Incorporating mediation clauses into
employment contracts and policies.

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Incorporating mediation clauses into employment contracts and policies

Organisations can begin to move towards a reduced conflict culture by incorporating mediation clauses into contracts of employment and organisational policies.

The strength of mediation lies in its flexibility of practice, where it has helped to introduce new ways of thinking and increase the resolution options available to parties engaged in a dispute or potential dispute. Mediation has introduced new positioning when it comes to moving from conflict to resolution. Of the many forms of dispute resolution, mediation is arguably the most flexible, user-friendly and pragmatic.

Context

Few organisations are without problems in their established ways of working. The increase in the type and complexity of employment legislation since the early 1990's has made the ability of HR professionals and line managers to manage people and introduce change, increasingly difficult. Recent research shows that, some employees have less loyalty to their organisation. Employees are also better informed of both their statutory or human rights and may be more willing to invoke them at the earliest opportunity.

Today's world of work is almost unrecognisable from the workplace of only a few years ago. Employers and employees have to embrace revolutionary communications advances, the introduction of flexible working arrangements, greater diversity, organisational restructuring, outsourcing and off-shoring. The information age will continue to speed up the pace of change that organisations will be forced to adopt.

Our relationships at work are generally based on three things - power, rights and interests. A line manager has the *power* to take actions and make decisions within their frame of reference, without consultation on a daily basis. We all have statutory and human *rights* that should be acknowledged and respected. It is however, only when we consider the *interests* of each other that we are likely to get true long term value and satisfaction from our working relationships. Smart managers avoid the first two and focus on leading a team through the third.

The law is based on a mental level, while humans interact primarily on an emotional level. The increasing levels and complexities of law at work are resulting in people finding it more restrictive to express emotions across a range of areas. This means that feelings become suppressed and when employees are unable to find an appropriate emotional channel with which to vent their feelings, they are left with few choices. These choices may be to:

- Leave the organisation
- Work to rule
- Retaliate in some way
- Complain to a higher authority and/or HR
- Invoke the disciplinary and grievance procedures



Points 1, 2, 3 and 5 are unlikely to result in resolution and closure of conflict. Point 4 may be beneficial if the line manager or HR function is competent in handling discussions of a confrontational nature. Recent research has shown however, that few (37%) of managers feel adequately trained to cope with conflict in the workplace.

The concept of mediation

An overview

Mediation is a voluntary process for resolving disputes in which another person helps the parties negotiate a settlement.

Mediation is **voluntary** in the sense that, in the majority of cases it takes place as a result of the parties agreeing to enter the mediation process. It cannot happen if one or more of the parties refuse to participate, although it is quite possible that parties who initially refuse may agree to mediation at a later stage.

Mediation is **non-binding** unless and until an agreement is reached. The agreement then becomes the contract. Until this point, parties may walk away from the mediation at any time as entering the process itself does not bind any party to settlement.

The mediator is a **neutral person** who is there to assist the parties in their negotiations. The mediator provides a clear head, impartiality, process management, encouragement and optimism, and above all, brings hope to situations that may seem hopeless, whilst always leaving the problem and the decision to settle it in the hands of the parties. A skilled mediator doesn't necessarily need to be an expert or specialist in the field to which the dispute is linked.

The mediator's role

The mediator fulfils several important roles: The mediator is:

- A manager of the process, conveying confidence that the process is working, and maintaining momentum and a sense of progress
- A facilitator, helping the parties to overcome deadlock and to find a way of working co-operatively towards a settlement that is mutually acceptable
- A reality tester, helping the parties to take a private realistic view
- A problem solver, bringing a clear and creative mind to help the parties construct an outcome that best meets their needs
- A sponge that soaks up all the emotions and uncertainties of the parties and helps them channel their energy in more positive ways
- A settlement prompter, who if no agreement is reached at the mediation will help parties to keep the momentum towards settlement.

It is important that the mediator gains the trust of the parties that he/she is competent enough to fulfill the required role. When parties have this trust of the mediator they are much more likely to disclose information relevant to the settlement of the dispute.



Why mediation works – The business case

There are a number of advantages to mediating a dispute rather than litigating. These include:

Speed of dispute resolution

People do not like being in conflict. It is worrying, time consuming, and a drain on both financial and management resources. Mediation sessions can be set up very quickly - within days if necessary.

Mediation does not affect statutory or human rights

The mediation process can run in tandem with the grievance and disciplinary process, introduced in October 2004. Because it is without prejudice, mediation poses little or no risk to parties who engage in the process.

Cost Savings

Issues can be settled quickly and can avoid legal or time management costs.

It improves communications

People in conflict tend to take up rigid positions and will avoid communicating with the party with which they are in conflict or communicate to them through an intermediary. The face-to-face meeting which occurs at the initial joint session allows open communication directly between the parties again. This can help ensure that methods for prevention of future conflicts arising in the future are addressed within the process.

It unearths the real issues

The mediator helps parties to focus on the real issues in their dispute. Having got the parties to agree to mediation, the mediator starts to move the parties to a settlement. Sometimes, if mediation does not settle on the day, it is because only now the real issues have been discovered and one or both of the parties may wish to discuss these with colleagues before continuing. A second session may of course be set up by the mediator.

Mediation is not a soft option

Mediation is hard work. It requires applied skill, energy and effort. It is often much easier to ignore a dispute rather than engage in the mediation process. An organisation may choose to invoke and enforce organisational processes such as the grievance and disciplinary procedure in favour of conflict resolution principles such as mediation. Where an employee may be in dispute with the employer, the employer may feel that it has acted properly in every sense and that an employment tribunal should decide who may have been right or wrong. This may be an appropriate course of action where the organisation wants to send a message to its employees about its willingness to defend itself. Even if an organisation wins its legal process it must of course weigh up the direct and indirect costs of such action and consider whether this is the best use of its resources.



Mediation is not counseling

The mediator and counselor share a number of core skills. However, their roles are completely different. Both mediation and counseling can take various forms but, in general the mediator preserves a neutral relationship with the parties, where as the counselor develops what can sometimes be described as an intense relationship with the client. The mediator uses agreement to be reached where as the counselor enables coping strategies to be found. The mediator uses problem-solving techniques; the counselor applies psychological analysis; the mediator acknowledges feelings where as the counselor explores emotions.

The mediator operates by a principle called 'omni-partiality' meaning they are on both parties side at the same time. This is not an easy skill to develop but can be learned over time through experience.

Mediation in the workplace

Resistance to addressing conflict in organisations is similar to the resistance that divides nations and communities. As organisations become more complex, they fragment and become more insular, creating silos with their own pockets of tribal language that can exclude particular individuals or groups. Many companies may resolve a dispute through compromise agreements. Whilst this provides a temporary reprieve it is unlikely to unearth and provide a solution for what might be ingrained cultural issues within an organisation. Therefore the organisation enters in to a cycle of throwing money at problems which are likely to continually linger below the surface and re-emerge later. This can also be a method of rewarding poor management and organisational systems. With the emergence of more and more data on the costs of conflict, the business case for adopting conflict resolution principles is clear.

Depending on the size of an organisation, the likely decision makers in the discussion for an organization to embrace the Model Mediation Guide will be CEO's, MD's, FD's HR directors, senior employee relations executives and in-house lawyers.

A HR or line function positioning a case for an organisation to adopt the principles of mediation are much more likely to succeed when cost savings can be demonstrated and successful trial case studies shown.

There are a number of ways to bring the principle of mediation into organisations. Perhaps the most effective is to incorporate mediation clauses into contracts of employment, staff handbooks and include in the induction process. This then becomes the reference point for any dispute or point of difference.

The principles of mediation can also be used to support a range of organisational processes such as:

- Managing change
- Increasing effective working at senior levels
- Working with Trade Unions
- The merger and acquisition process
- Managing customer relationships
- Project management



Internal or external mediator?

It is ultimately the choice of the organisation to decide which option will work best, based on the merits of each case and the size of the organisation. An organisation with a high number of employees and a small number of trained and trusted mediation specialists can be successful. A smaller organisation may choose to rely more heavily on external mediators. The Globis mediation service includes supporting organisations with the appointment of an appropriate internal or external mediator.

There are considerations to having either an internal (an employee of the organisation) and external mediators. Some of these are listed in the table below.

Internal or external mediator?	
Internal	External
<p>Knows and understands the organisational culture</p> <p>Potentially requires less briefing</p> <p>No or little cost</p> <p>May not be perceived as impartial</p> <p>May have historical baggage</p> <p>Experience level may be low</p>	<p>Comes with little or no knowledge of the organisation or parties with dispute</p> <p>May be a more experienced mediator with the ability to pick up issues quickly</p> <p>Charges for services</p> <p>Likely to gain trust of parties</p> <p>Able to provide the organisation with a fresh view or possible cultural or organisational issues</p> <p>Offers true independence</p>



Model mediation clauses

Ultimately, any company seeking to incorporate a mediation framework within its contractual and policy procedures will need to ensure that senior managers are bought in to the process. Organisations can measure the effectiveness of a mediation scheme by setting objectives that will determine long term cost savings e.g. the number of tribunals or grievance and disciplinary cases prior to introducing a mediation scheme against the number after a mediation scheme has been introduced. Where possible, results should be published across the organisation.

Below is Globis' suggested corporate policy statement for signature by a company's CEO/Legal/HR Director.

Policy statement for corporate organisations

We recognise that for many disputes, there is a more cost effective method than litigation. Mediation procedures involve collaborative techniques which can often be embraced for a fraction of the high costs associated with going to law.

In recognition of this we subscribe to the following statement of principle on behalf of our company.

In the event of an internal dispute or a business dispute between our company and another company, we are prepared to explore resolution of the dispute through mediation, prior to pursuing litigation. If either party believes that the dispute is not suitable for mediation or that mediation will not produce satisfactory results, either party may proceed with litigation or statutory procedures.

Contract clause

The company promotes the prompt resolution of disputes. In the event of any dispute arising out of, or related to this agreement, or any subsequent agreement between the parties ("dispute"), and if the dispute cannot be resolved through normal line management channels, the parties agree to submit the dispute to mediation by a mediator selected in conjunction with the Globis Mediation Model. Your statutory rights are not affected through the mediation process.

The mediation shall take place within thirty (30) days of the date that the party gives written notice of its desire to mediate the dispute. The duties to mediate shall extend to any other employee or associate of the company.

Clause relating to collective bargaining agreements

The company promotes the prompt resolution of disputes. In the event of any dispute arising out of or related to this collective bargaining agreement, or any subsequent agreement between the parties ("dispute"), and if the dispute cannot be resolved through normal line management channels, the parties agree to submit the dispute to mediation by a mediator selected in conjunction with the Globis Mediation Model. Your statutory rights are not affected through the mediation process.



The mediation shall take place within thirty (30) days of the date that the party gives written notice of its desire to mediate the dispute. The duties to mediate shall extend to any other employee or associate of the company.

The company will work with _____ (the recognised Union) within the terms of the Globis (*or in-house*) Model Mediation Guide as outlined in section ___ of the employee contract [and/or] employee handbook.

Clause relating to the grievance and disciplinary process

The company promotes the prompt resolution of disputes. In the event that a dispute arises relating the grievance and disciplinary process between parties ("dispute"), and if the dispute cannot be resolved through normal line management channels, the parties agree to submit the dispute to mediation by a mediator selected in conjunction with the Globis Mediation Model. Your statutory rights are not affected through the mediation process.

The mediation shall take place within thirty (30) days of the date that the party gives written notice of its desire to mediate the dispute. The duties to mediate shall extend to any other employee or associate of the company.

If mediation fails, you retain your statutory entitlement to pursue the grievance and disciplinary procedures.

Clause relating to Equality/fairness at work

The company promotes the prompt resolution of disputes. A line manager and employee should attempt to solve any dispute in the first instance. Where this is not possible, the parties agree to submit the dispute to mediation by a mediator selected in conjunction with the Globis Mediation Model. Your statutory rights are not affected through the mediation process Disputes should attempt to be resolved at the earliest opportunity to prevent further escalation.

Your statutory rights are not affected by using the mediation scheme.

The mediation shall take place within thirty (30) days of the date that the party gives written notice of its desire to mediate the dispute. The duties to mediate shall extend to any other employee or associate of the company.

Note:

When drafting appropriate mediation clauses it is important to consider:

- The culture of the organisation
- Whether there is union recognition
- Buy-in from key stakeholders
- Wording that reflects the flexibility of the mediation process
- Inclusion in the company induction documentation

Any wording should be ratified by your in-house or external legal team. If your organisation has union recognition, the union should be consulted and advised on the company's intention to incorporate mediation clauses within the employment framework.